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Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-223

CENTRAL HARDWARE COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD
and
RETAIL CLERKS UNION, LOCAL 725, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO
Respondents

Brief of Levitz Furniture Corporation as Amicus Curiae in Support of the Position of the Petitioner.

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INTEREST OF AMICUS CURIAE *

Levitz Furniture Corporation (herein "Levitz") is a nationwide furniture retailer which operates more than thirty furniture warehouse showrooms throughout the United States. Most Levitz Warehouse Showrooms are free-standing buildings with their own separate parking lots. None of the Levitz warehouse showrooms are located in a shopping center nor do any of them share common walls or common parking lot facilities with any other business.

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* This brief is filed with the written consent of counsel for all parties in accordance with Rule 42(2) of the Court.

The parking lot on each Levitz Warehouse Showroom is accessible from at least one public thoroughfare. Each parking lot is posted with signs limiting the use of the parking lot to employees and persons doing business with Levitz. Each Levitz Warehouse Showroom has a no-solicitation rule which prohibits solicitation or distribution of literature by non-employees anywhere on the company premises. On a number of occasions union representatives have attempted to invade company parking lots to organize Levitz' employees.

The subject matter of the instant case, the trespass by union representatives on an employer's premises, is a matter of great concern to Levitz. The decision in this case, because of the physical similarity between the Central Hardware establishments and the Levitz establishments, will virtually control the right of Levitz and other free-standing store retailers concerning the use of their private property. With its decision in this case the Court will vitally affect the private property rights of retailers throughout the country.

ARGUMENT

I

The Decision Below Fails To Make a Proper Distinction Between Public Property and Private Property

The National Labor Relations Board (herein "the Board") found that the employer violated Section 8(a)(1) of the National Labor Relations Act (herein "the Act") by maintaining and enforcing an overly broad no-solicitation rule against non-employees.[1] The

[1] *Central Hardware Company and Retail Clerks Union Local 725, Retail Clerks International Association, AFL-CIO*, 181 NLRB No. 74 (1970).

decision of the Board was affirmed by the Eighth Circuit Court of Appeals with Justice Gibson dissenting.[2] The opinion of the Eighth Circuit, with respect to the non-employee no-solicitation rule, was based on the "mandate" of *Logan Valley* since the fact situation was found to be distinguishable from that in *Babcock & Wilcox.*[3]

The extremities of this controversy, the right of non-employees to use the private property of an employer for union purposes, have already been decided by the Court in *Babcock & Wilcox* and *Logan Valley Plaza.* In *Babcock & Wilcox,* the Court decided that non-employee union representatives could be denied access to the private parking lot of an employer where the union had reasonable alternative methods of communication with employees which could be utilized to solicit union membership. In *Logan Valley,* the Court held that an employer and an owner of a private parking lot of a suburban shopping center could not, through the use of the state trespass laws, absolutely deny non-employee union representatives the right of access to the parking lot to publicize a labor dispute between the union and the employer. The question presented to the Court by the instant case falls in between the fact situations of *Babcock & Wilcox* and *Logan Valley Plaza.*

The holding of the Court in *Logan Valley Plaza* was limited as follows:

> "All we decide here is that *because the shopping center serves as the community business block* 'and

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[2] *Central Hardware Company* v. *National Labor Relations Board,* 439 F.2d 1321 (8th Cir. 1971).

[3] *Amalgamated Food Employees Union Local 590, et al* v. *Logan Valley Plaza, et al,* 391 U.S. 308 (1968); *National Labor Relations Board* v. *Babcock & Wilcox Company,* 351 U.S. 105 (1956).

1. That under the standards set forth in *Babcock* Central's rule is valid and the union organizers were lawfully excluded from Central's lots because the employees were accessible elsewhere and the rule was not discriminatorily applied.

2. That Central's parking lots have not attained a "quasi-public" status and Central retains the right to bar union organizers from the lots.

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is freely accessible and open to the people in the area and those passing through,' *Marsh* v. *Alabama,* 326 U.S. at 508, 90 L ed at 269, the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose *generally consonant with the use to which the property is actually put.*"[4] [Emphasis Added]

For a proper understanding of the holding in *Logan Valley,* one must read the cornerstone of the Court's decision, i.e., *Marsh* v. *Alabama.*[5] In *Marsh* the Supreme Court held that when a private corporation owns and operates an entire town, the First Amendment freedoms of those persons living within the town and those persons passing through the town may not be abridged by the owner of the town on the basis of private property. In deciding *Logan Valley,* the Court equated the Logan Valley Plaza shopping center to the "community business block" in *Marsh.*

The limiting language in *Logan Valley* dictates that *before* private property may be characterized as public property or even quasi-public property there must be a finding that the subject property:

(a) serves as the functional equivalent of the "community business block" and

(b) is freely accessible and open to the people in the area and those passing through.

The facts of the instant case are vitally important to a proper resolution of the question presented to the

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[4] *Amalgamated Food Employees Union Local 590, et al* v. *Logan Valley Plaza, et al, supra,* 319-320.

[5] *Grace Marsh* v. *State of Alabama,* 326 U.S. 501 (1946).

Court. The facts indicate that the parking lots of Central Hardware do *not* serve as the "community business block" and are *not* freely accessible and open to the people in the area and those passing through. Central Hardware has specifically prohibited the use of its parking lots to persons not employed by or doing business with Central Hardware. The record before the Board's Trial Examiner is replete with evidence of occasions when non-employees or persons not doing business with Central Hardware were denied the use of the parking lots. This case presents a clear record of a *limited invitation* to the users of the parking lots.

Justice White, in his dissent in *Logan Valley*,[6] clearly stated what we believe must be the finding in this case. That is, a retailer's invitation to the public may be limited to an invitation for the public to come on to the retailer's property *for the purpose of doing business with that retailer* and that such an invitation is *not* a general invitation to do whatever else the invitee may desire, even where the actions of the invitee would be within the invitee's First Amendment rights if done on public property. As Justice White said:

> "The public is invited to the premises but only in order to do business with those who maintain establishments there. The invitation is to shop for the products which are sold. There is no general invitation to use the parking lot, the pick-up zone, or the sidewalk except as an adjunct to shopping. No one is invited to use the parking lot as a place to park his car while he goes elsewhere to work. The driveways and lanes for auto traffic are not offered for use as general thoroughfares leading

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[6] *Amalgamated Food Employees Union Local 590, et al* v. *Logan Valley Plaza, et al, supra,* at 337.

> from one public street to another. Those driveways and parking spaces are not public streets and thus available for parades, public meetings, or other activities for which public streets are used. . . . The point is that whether Logan Valley Plaza is public or private property, it is a place for shopping and not a place for picketing.
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> * * *
>
> "... I do not agree that when the owner of private property invites the public to do business with him he impliedly dedicates his property for other uses as well."[7]

The Board's decision and the Eighth Circuit's opinion that the parking lot of Central Hardware is generally open to the public were based not on any express invitation but rather on an implied invitation apparently found to exist on the basis of the proximity of the subject property to established roads and other stores in the area, the absence of fences, guards, gates and notices prohibiting the use of the property by the public and the fact that Central Hardware invites the public to do business with it.[8] Obviously neither the Board nor the Eighth Circuit considered this implied invitation to be limited by Central Hardware's denial of the use of the parking lots to persons not employed by or

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[7] *Ibid,* at 338-339. See also, *Stafford* v. *Hood,* 213 Tenn. 684, 378 SW2d 766 (1963); *South Discount Foods Inc.* v. *Retail Clerks Union Local 1552,* 14 Ohio Misc. 188, 235 NE2d 143 (1968). Cf. *Harriett Louise Adderley, et al* v. *State of Florida,* 385 U.S. 39, at 47 (1966), wherein the Court said "[A] private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."; *John Earl Cameron, et al* v. *Paul Johnson, etc., et al,* 390 U.S. 611 (1968); *B. Elton Cox* v. *State of Louisiana,* 379 U.S. 536 (1965).

[8] *Central Hardware Company* v. *National Labor Relations Board, supra,* at 1328.

doing business with Central Hardware. It should also be noted that despite the Court's painful attempt to equate the shopping center in *Logan Valley* to the "Community business block" in *Marsh,* neither the Board nor the Eighth Circuit found it necessary to hold that the private parking lots of Central Hardware were equivalent to the "community business block".[9]

Do the factors of proximity to existing roads and other businesses and the lack of fences, gates, guards or signs barring the use of the premises make concededly private property public or quasi-public property? Does the proximity of private property to a public park, public square or other public arena which is traditionally used for the exercise of First Amendment freedoms make that private property public or quasi-public property? If the answer to these questions is in the affirmative, it is submitted that the concept of private property is of little more than historical significance since even a private home could be considered public or quasi-public.

Is an invitation to the general public to do business with a retail store sufficient to change the private character of the store and property upon which it is located into public property? If the answer to this question is in the affirmative, it is submitted that the Court in *Logan Valley* wasted time and effort in reviewing with great detail the physical characteristics and use of the property involved in arriving at its conclusion that the suburban shopping center was functionally equal

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[9] Justice Black, in his dissent in *Logan Valley Plaza, commented,* "All I can say is that this (shopping center) sounds like a very strange 'town' to me." 391 U.S. 331. To that we add that the Central Hardware parking lot must be an even stranger town since it is nothing more than a large piece of asphalt covered ground with parking lines painted on it.

to the "community business block" of Chickasaw, Alabama.

Since the Court in *Logan Valley Plaza* took pains to go to great length and detail in analyzing the physical characteristics of the shopping center, the use of the property and the ownership of the property before arriving at its final conclusion that the shopping center was the same as the "community business block" in *Marsh,* it must follow that this analysis is essential to a determination of what property is to be considered public or quasi-public. The facts of the *Central Hardware* case indicate that Central Hardware owned or leased no other property in the area of its stores other than that which was devoted to its stores and parking lots. Each of the other stores and places of business in the area were separately owned and had their own separate parking facilities. There was no common development between the owners or other property and Central Hardware. There was no joint design or joint venture for the development of the property in the area. Accordingly, based upon the lack of common areas, common sidewalks, common parking spaces, common development and common ownership, it cannot be concluded that the separate, free-standing retail store described in *Central Hardware* is equal or even similar to the shopping center in *Logan Valley* or the community business block in *Marsh.*

Since the Central Hardware property is not equivalent to the property in *Marsh* or the property in *Logan Valley Plaza,* the Central Hardware store and parking lot must retain its private character and cannot be characterized as public or quasi-public property. Therefore, the invitees of Central Hardware have only those rights afforded to them by the management of Central Hardware. The rights afforded by Central

Hardware do not include the right to picket or the right to solicit employees of Central Hardware to join a union, *ergo,* the enactment and enforcement of a no-solicitation rule for non-employees does not violate the Act.

II

Under Logan Valley Union Solicitation Can Be Prohibited on Quasi-Public Property

Even if the Court decides that the Central Hardware parking lot is quasi-public property, the inquiry under *Logan Valley* does not stop there. *Logan Valley* requires the Court to make further inquiry as to whether the conduct of the union was protected under the First Amendment.

While it is submitted that under the facts of *Central Hardware* the Court need not determine whether First Amendment freedoms were involved since it is clear that the parking lot did not lose its private property characteristics, if the Court decides to the contrary it must further decide whether non-employee union organizers in *Central Hardware* were exercising First Amendment freedoms in their solicitation of union memberships.[10]

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[10] This question was left open by the Court in *Logan Valley.* In footnote 9 of *Logan Valley* the Court said, *inter alia,* that it was ". . . not called upon to consider whether Respondents' (the shopping center and Weiss's Supermarket) property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose (advising the public that Weiss was non-union and that Weiss's employees were not receiving union wages or other benefits) to the use to which the shopping center property was being put." *Amalgamated Food Employees Union Local 590, et al* v. *Logan Valley Plaza, et al, supra,* at 320. In fact, Justice Douglas, in his concurring opinion, found that the picketing in regard to the labor conditions at Weiss was "directly related" to that shopping center business. *Ibid,* at p. 326.

In affirming the Board's finding of a violation of Section 8(a)(1) of the Act by the maintenance and enforcement of the non-employee no-solicitation rule, the Eighth Circuit stated:

> "We start from the premise that peaceful picketing carried on in a location generally open to the public is, absent special factors involving the purpose or manner of the picketing, protected by the First Amendment. We think it clear that union organizers in soliciting support *through peaceful picketing exercise First Amendment rights.*"[11] [Emphasis Added]

The language of the Eighth Circuit is puzzling since there is no reference, whatsoever, anywhere in the record to the use of "peaceful picketing" in the solicitation efforts by the union organizers. To the contrary, the record reflects that the union organizers used "blitz-type"[12] tactics, confrontation, and argument to accomplish the attempted goal of union organization.

It is clear that when a speaker addresses an audience and advocates political concepts, religious concepts or advocates unionism or the alleged benefits of unionism, his speech itself is protected by the First Amendment.[13] However, as indicated by the Court:[14]

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[11] *Central Hardware Company* v. *National Labor Relations Board, supra,* at 1328. However, such conduct can come within Section 8(b)(7) of the Act which specifically limits picketing for recognitional purposes to a maximum of thirty days. In limiting this type of picketing, Congress apparently recognized the obvious unfairness in permitting unlimited recognitional picketing.

[12] *Ibid,* at 1324.

[13] *R. J. Thomas* v. *H. W. Collins,* 323 U.S. 516 (1945); *Rose Staub* v. *City of Baxley,* 355 U.S. 313 (1958).

[14] *R. J. Thomas* v. *H. W. Collins, supra,* at 540.

> "Once the speaker goes further, however, and engages in conduct which amounts to more than the right of free discussion comprehends, *as when he undertakes the collection of funds or securing subscriptions,* he enters a realm where a reasonable registration or identification requirement may be imposed." [Emphasis Added]

The record in the instant case reflects no "peaceful picketing" but, to the contrary, reflects confrontation, argument, and attempts to secure subscriptions with the obvious ultimate objective of collection of funds through union fees and dues. The activities of the union organizers are akin to any other solicitation by any other commercial enterprise, i.e., the union claims to have a "service" to offer in return for which it receives a remuneration. The union organizers were selling union memberships to the employees of Central Hardware in the same manner that a magazine salesman sells magazine subscriptions. Since an owner of property and the state have the right to prohibit the solicitation by peddlers and hawkers on private property, Central Hardware has a corresponding right to prohibit the solicitation of union memberships on its property.[15]

The Court's authority in *Logan Valley Plaza* is inapplicable to the instant case for the reasons that:

1. The Central Hardware parking lot is not the functional equivalent of the Logan Valley Plaza shopping center;

2. The public was not invited to use the Central Hardware parking lot for the purpose for which it was used by the non-employee union organizers;

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[15] *Jack H. Breard* v. *City of Alexandria,* 341 U.S. 622-650 (1951).

3. The non-employee union organizers were not engaged in the exercise of free speech but were engaged in the commercial venture of seeking to obtain union memberships and dues; and

4. The use of the premises by the non-employee union organizers was not consonant with the use to which the property was being devoted.

III

The Act Itself Does Not Give Non-Employees the Right To Go Onto Private Property for Union Purposes

Did the non-employee union organizers have a right to be on the Central Hardware parking lot under the authority of the National Labor Relations Act?

The only possible authority for the right of non-employee union organizers to be on the Central Hardware private parking lot is found in *Babcock & Wilcox*. The Court in *Babcock & Wilcox* held that non-employee union organizers were given no right under the Act to be on the private parking lot of an employer unless it has been shown that there are no other reasonable means of access to the employer's employees.

The Board's decision in *Central Hardware* found that the non-employee union organizers had no reasonable means to reach the employees of Central Hardware other than by meeting them on the employer's parking lot. Does the record as a whole furnish adequate support for this finding? Based on the Court's criteria in *Babcock & Wilcox* the answer to this question must be in the negative. The Board specifically found that the union had a list of names and addresses of 80% of the Central Hardware employees. Notwithstanding the possession of this list, the record reflects

no union attempt to solicit support for union organization through the mails or by telephone. The absence of any evidence or testimony as to the effectiveness of telephone and mail solicitations must in itself spell doom to the union's attempt to gain access to the employer's private parking lots.[16] Since there is inadequate support for the conclusion of the Board that there were no reasonable means of access to the employer's employees other than by confrontation on the parking lots, the finding of the Board must be rejected.

CONCLUSION

The non-employee union organizers had no right, statutory, constitutional, or otherwise, to be upon the Central Hardware private parking lot for union purposes. Therefore, the enactment and enforcement of the no-solicitation rule as applied to non-employees does not violate the Act.

Respectfully submitted,

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[16] The burden of showing that the employer's employees were not accessible through the conventional means of communications, e.g., mail and telephone, was upon the General Counsel and not the employer. Dissent of Judge Gibson in *Central Hardware Company* v. *National Labor Relations Board, supra,* at 1330.